

APPENDIX I

Millennium Lab Holdings II, Hr'g Tr., dated December 15, 2015 [Case No. 15-12284-LSS]

1 findings to support the conclusions.

2 Since 2000, this Court and others within this
3 jurisdiction have approved plans containing third-party
4 releases, when appropriate, under the Continental hallmarks.
5 Voya has cited no cases within this jurisdiction which have
6 found, as a matter of law, that third-party releases are, per
7 se, impermissible. I will not reach out to other circuits to
8 adopt such a position.

9 In analyzing whether the Continental hallmarks are
10 satisfied, some courts within this circuit considered the
11 factors announced by the Master Mortgage Court, discussed in
12 Continental and adopted by Zenith, with respect to debtor
13 releases. These factors are:

14 An identity of interest between the debtor and the
15 third party, such that a suit against the debtor is, in
16 essence, a suit against the -- a suit against the non-debtor
17 is, in essence, a suit against the debtor, or will deplete
18 assets of the estate.

19 Substantial contribution by the non-debtor of assets
20 to the reorganization.

21 The essential nature of the injunction to the
22 reorganization, to the extent that, without the injunction,
23 there is little likelihood of success.

24 An agreement by a substantial majority of creditors to
25 support the injunction; specifically, if the impacted class or

1 classes overwhelmingly votes to accept the plan.

2 And a provision in the plan for payment of all or
3 substantially all of the claims of the classes -- class or
4 classes affected by the injunction.

5 Looking at the factors in order, first I find that
6 there is an identity of interest between the debtors and the
7 third parties, including those in the Voya complaint, because
8 of the indemnifications and advancement obligations discussed
9 above. Any litigation claims brought against the released
10 parties will result in claims being brought for indemnification
11 and advancements, or certainly conceivably could. While such
12 claims will not reduce the recoveries of those creditors
13 receiving 100 cents on the dollar, such claims will reduce
14 recoveries for Class 2, the prepetition lenders, because they
15 take equity.

16 Further, I find that the released parties, including
17 TA, MLH, the U.S.A. settlement parties, the participating
18 lenders, and the D's and O's, all share a common goal of
19 confirming and implementing the plan, which contains settlement
20 of contested and costly litigation. These goals include:
21 Right-sizing the reorganized debtors' balance sheet, avoiding
22 complex litigation costs and delay, maximizing the debtors'
23 value for all concerned.

24 This finding supports the conclusion that there is an
25 identity of interests between the debtors and the released

1 parties. And I would cite Tribune, 464, at 187; and Quorum
2 (phonetic), 315, at 335.

3 As to the second factor, I find that there is a
4 substantial contribution by the non-debtor parties of assets to
5 the reorganization.

6 First, as to TA and MLH, if this plan is confirmed, TA
7 will contribute 146 and a quarter million dollars to the
8 debtors. MLH will contribute 178 and three-quarters million
9 dollars to the debtors. There is an indication that each of
10 the shareholders in MLH, James Slattery, Howard Appel, David
11 Cohen, Greg Stein, Sunshine Alexis Stein, Marvin Retsky, and
12 Murray Rosenthal, are paying their proportionate contribution
13 of this amount. Each of TA and MLH are relinquishing their
14 equity interest in the debtors consensually. Each of TA and
15 MLH are releasing claims against the debtors.

16 As to TA and MLH, I find that this contribution is
17 substantial and real. I also find, on the facts of this case,
18 that the contribution made by TA and MLH and each individual
19 shareholder, which settles claims against them, based on the
20 2014 recapitalization transaction, is made on behalf of
21 themselves and their "related parties," as that term is used in
22 the plan. Each of these corporate families must be protected,
23 in order for TA and MLH to buy peace in this litigation.

24 As to the prepetition lenders, they have made
25 substantial contributions by relinquishing their existing

1 credit agreement claims and other potential claims against the
2 related parties, entering into the restructuring support
3 agreement, and voting in favor of the plan. Because of this
4 workout, other creditors are receiving 100 cents on the dollar.
5 As the liquidation analysis attached to the disclosure
6 statement indicates, in a liquidating plan, the unsecured
7 creditors receive no distribution. Thus, I find this
8 contribution to be substantial on the facts of this case.

9 As to the directors and officers, this is a closer
10 call. Mr. Hardaway testified in his declaration that the
11 directors and officer made, quote:

12 "-- unique and substantial commitments of time and
13 effort to bring this global settlement before the
14 Court for confirmation."

15 Mr. Hardaway also testified in his declaration, that,
16 quote:

17 "Debtors' management will continue to work in their
18 present roles for the reorganized debtors, and as
19 such, make indispensable contributions to the
20 successful reorganization of debtors."

21 On the one hand, some of my colleagues have ruled on
22 numerous occasions that sweat equity is not sufficient
23 consideration for a release. On the other hand, there are
24 cases cited by the debtors for the proposition that continued
25 service is a substantial asset to the reorganization.

1 I am not rejecting the argument that sweat equity
2 alone may not be sufficient to constitute a substantial
3 contribution in a given case. But in this case, where the
4 record is unrebutted that the efforts of management
5 successfully resulted in a viable plan that garnered support
6 from all parties other than Voya, and results in 100 percent
7 payment to all creditors other than the prepetition lenders;
8 and that management, in the prepetition lenders' view, is
9 critical to unlocking the reorganized debtors' total enterprise
10 value, I find that the directors and officers have made a
11 substantial contribution.

12 The third factor is the essential nature of the
13 releases and injunctions to the reorganization to the extent
14 that, without the releases and/or injunction, there is little
15 likelihood of success.

16 While there was some debate about whether this factor
17 requires that the releases are a prerequisite to obtaining the
18 funding for the plan, or whether the releases themselves are a
19 necessary component of the plan, I find this factor is
20 satisfied, regardless of the interpretation.

21 Here, the unrefuted evidence is that that third-party
22 releases, all of them, even those who may not have made a
23 substantial contribution to the reorganization in the classic
24 sense, was required to obtain the funding for this plan.

25 The declarations of Mr. Kurtz and Mr. Aloise were

1 clear, and there may have been others supporting this, as well.
2 And I will quote from Mr. Kurtz's declaration at Paragraph 14:
3 "The third-party releases and related provisions in
4 the RSA and plan, disputed by Voya, were heavily
5 negotiated among the debtors, the equity holders, and
6 the ad hoc group. The releases in particular were
7 specifically demanded by the equity holders as a
8 condition to making the contribution reflected in the
9 plan, and demanded by the other released parties, in
10 exchange for their contributions to and support for
11 the plan and reorganization.
12 "I believe" -- that's Mr. Kurtz -- "the releases and
13 related provisions were necessary to induce the equity
14 holders to make the three-hundred-and-twenty-five-
15 million-dollar settlement contribution that serves as
16 a critical element of the reorganization plan.
17 Moreover the equity holder settlement contribution was
18 necessary to induce the ad hoc group's support of the
19 RSA and the plan.
20 "I believe that, based on my personal involvement in
21 the negotiations with the various parties-in-interest,
22 without the third-party releases provided by the
23 prepetition lenders, as set forth in the plan" -- no,
24 that's -- "without the third-party releases, there
25 will be no cash contribution available to fund the

1 government settlements. Further, absent consummating
2 the U.S.A. settlement in accordance with the terms of
3 the plan, the company will liquidate and all going
4 concern value will be lost."

5 Thus, it is clear that the releases are necessary to
6 both obtaining the funding and consummating a plan. In these
7 cases, the funding does not merely enhance creditor recoveries;
8 it is necessary for the debtor to confirm the plan.

9 The fourth factor. The fourth factor is whether the
10 substantial majority of creditors support the releases, and
11 whether, in particular, the impacted class overwhelmingly votes
12 to accept the plan.

13 This factor is easily satisfied as to Class 2,
14 existing credit agreement claims. As evidenced by the
15 declaration of James Daloia of Prime Clerk, LLC, the tabulator
16 of votes on the plan, Class 2 accepted its treatment under the
17 plan by 93.02 percent in number and 93.74 percent in amount.

18 The fifth factor. The fifth factor is whether the
19 plan provides for the payment of all or substantially all of
20 the claims of Class 2. As interpreted by Judge Carey in
21 Tribune, the standard is whether the nonconsenting creditors
22 receive reasonable compensation in exchange for the release.

23 The evidence is that Class 2 will receive a six-
24 hundred-million-dollar new term loan, all of the equity
25 interest in the reorganization, and recoveries under the two

1 trusts that are formed under the plan, as well as perhaps suit
2 against excluded parties.

3 Mr. Kurtz has estimated the total enterprise value of
4 the reorganized debtors is in excess of \$900 million, on a
5 going concern, pro forma, reorganized basis. His valuation
6 assumes that the plan is confirmed and goes effective by
7 December 31st. His valuation also assumes that present senior
8 management will continue in their current positions. There was
9 no challenge to this valuation.

10 I find the value to be received by Class 2 creditors
11 to be reasonable compensation for this release, as did over 90
12 percent of the prepetition lenders. In particular, in the
13 event of a liquidation of the debtors, and as reflected in the
14 disclosure statement and unchallenged by any party, the
15 prepetition lenders would receive between one percent and five
16 percent, and general unsecured creditors would receive nothing
17 in a liquidation. Therefore, I find the fifth factor is
18 satisfied.

19 Having walked through the factors, which courts
20 examine, I return to the Continental hallmarks of appropriate
21 third-party releases and injunctions: Fairness and necessity
22 to the reorganization. Taking into consideration the facts of
23 this case, I find the releases and injunctions to all parties
24 to be fair and necessary to the reorganization.

25 To only summarize, but not replace the above findings

1 and rulings, I find significant to my decision that:

2 One, the contributions made by MLH and TA are
3 absolutely essential to the reorganization of this debtor.
4 Without the contributions, there is no reorganization. While
5 Voya would have me speculate as to other options, I do not see
6 one. CMS will revoke the debtors' license, and there will be
7 no ongoing business if payment is not made to the U.S.A.
8 settlement parties by December 30th.

9 Two, there is an enormous disparity between the
10 reorganization value and the liquidation value of this company.
11 So the contributions facilitate distributions to creditors --
12 not only facilitate distribution to creditors, including those
13 in Class 2, but those -- again, those distributions are
14 enormously greater in a reorganization, versus a liquidation.

15 The prepetition lenders are subordinating their claims
16 to permit unsecureds to receive a 100 percent recovery.
17 Without this settlement, this case turns into litigation.
18 Inherent in that litigation is the uncertainty of success,
19 expenses and delay in obtaining recoveries. Over 90 percent of
20 the creditors prefer recoveries from an ongoing business.

21 All parties were at the table in the negotiation in
22 this settlement contained in a plan. This is not a situation
23 of entrenched management forcing recoveries upon unwilling
24 creditors, and seeking a release in connection with that.

25 There was no objection to the settlement, even by

1 the third party releases. Are we to alter any of the
2 parties that are included in the third party releases?

3 THE COURT: No.

4 MR. HALL: Thank you, Your Honor. Appreciate it.

5 THE COURT: Okay. Is there anything else for
6 today?

7 MS. GOOD: No, Your Honor, nothing else for today.
8 Thank you for your ruling. We will incorporate those
9 changes, file the further amended plan and the confirmation
10 order under certification of counsel and have that
11 (indiscernible)...

12 THE COURT: Okay, thank you. I appreciate the
13 extremely well-briefed and argued issues that were before me
14 today. It's great. Very helpful to the Court. So, I
15 appreciate it all. And with that, I wish everybody a good
16 day and we are adjourned.

17 MS. GOOD: Thank you, Your Honor.

18 MR. HALL: Thank you, Your Honor.

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In re TK Holdings Inc., Hr'g Tr., dated February 16, 2018 [Case No. 17-11375-BLS]

1 is an extraordinary case.

2 And so when I look at the five factors, again, I
3 will address them in summary form, and I note and rely upon
4 the evidence that was submitted, particularly, Mr. Bowling's
5 declaration laying out the factors. But, nevertheless, for
6 purposes of completeness of the record, courts have
7 considered whether is there an identity of interest.

8 The Court has spent a great deal of time over the
9 past six or seven months, dealing with these proceedings and
10 identifying matters where there are indemnification
11 obligations that are running in every possible direction; in
12 addition, many, if not all of the release parties, including
13 officer and directors of the debtor entities, are parties
14 that would have meaningful indemnification rights.

15 So, the fact of the matter is, as the Court noted
16 in the injunction litigation, litigation against the debtor
17 is often litigation against multiple parties. And litigation
18 against the OEMs or other parties is effectively litigation
19 against the debtors. I am satisfied that the identity of
20 interest prong has been satisfied.

21 Second, the question of substantial contribution.
22 Again, I don't think there is any meaningful dispute that
23 there is, in fact, substantial contribution being provided by
24 each of the parties. The OEMs have provided for the
25 restitution of substantial claims in support of the debtors

In re Tritex International, Inc. et al., Hr'g Tr., dated October 5, 2023 [Case No. 23-10520-TMH]

1 THE COURT: Okay. I want to take a few moments to
2 gather my notes and why don't we come back on the record at
3 1:15, unless the parties would like a longer break to go to
4 lunch or anything of that sort.

5 MR. HALL: From our perspective, Your Honor, we
6 defer the Court.

7 THE COURT: Yeah, okay. Well, let's push it
8 through then. We'll recess until 1:15.

9 (Recess)

10 THE COURT: Okay, I'm prepared to rule on the
11 plan. I want to start by noting that I appreciate the work
12 of the parties and the cooperation that went into it to
13 narrow the issues and come to resolutions on many important
14 issues. And I note that when the plan was solicited, the
15 committee had a statement that said that they urged the
16 creditors to vote against the plan. And I think it's really
17 significant that the committee is here today supporting the
18 plan. And through the work of the parties, the projected
19 recovers to unsecured creditors have increased meaningfully.
20 The projections have increased meaningfully. So, I
21 appreciate that.

22 I'm going to grant final approval of the
23 disclosure statement, and I am going to confirm the fourth-
24 amended plan. The opt out versus opt in issue and the
25 question of what constitutes consent are questions that, as

1 we know, are not uncontroversial. But, in my view, if a
2 party receives notice of proposed releases and doesn't
3 object, that party has consented to the releases. As in
4 many other respects, when it comes to bankruptcy, parties
5 are required to be vigilant and defend their rights, and
6 such is the case here. In this case, I find that the opt
7 out, it was conspicuous and some creditors did opt out,
8 which evidences to me that the procedures were effective.

9 The UST raises a number of concerns that I take
10 very seriously and I'm grateful for the outstanding argument
11 from the UST and appreciate the positions that the office
12 takes. The UST raises concerns about the possibility of
13 mail errors preventing parties from receiving notice. But I
14 note that the federal rules of bankruptcy procedure and
15 civil procedure call for mail notice, and there is a
16 rebuttal presumption of receipt when a piece of mail is sent
17 to an addressee. And I think it's the system that we have
18 and it's the one that we have to live with.

19 As for unimpaired creditors, the evidence before
20 me shows that they received notice identifying the release
21 provisions of the plan, directing them on how to receive
22 copies of the full plan if they wished, free of cost, and
23 identified procedures for objecting to being a releasing
24 party. And I find this to be adequate and also find that
25 any unimpaired creditor who received such notice and did not

1 object has consented to the release that they are granting.

2 I find the scope of the third party releases to
3 generally be appropriate but I raise an issue about third
4 party releases only extending to unknown claims, and I
5 believe it should extend to known claims as well.

6 Also, to the extent there are parties receiving
7 releases that are, in effect, illusory because they already
8 benefit from exculpation, or in the case of a liquidating
9 trustee, there can be no pre-effective date claims to
10 release, the drafting may be overzealous. And I won't fault
11 anybody for that, but there is no harm.

12 So, on those grounds, I am confirming the plan.
13 There is the one revision I identified and I think there may
14 be others coming, but I would ask the parties to submit the
15 -- well, to file a further amended plan if that's what we're
16 doing and also to submit the proposed form of order as
17 revised under certification of counsel so that it appears on
18 the docket. And I have had a chance to review it and I will
19 enter the order. But, again, I do want to emphasize my
20 appreciation to the Office of the United States Trustee for
21 their argument. It is a very important issue and one that I
22 take very, very seriously. And I think it's my first time
23 ruling on the issue.

24 MR. HALL: Your Honor, if I may, just to make sure
25 I understand? We will add known in addition to unknown in

1 the third party releases. Are we to alter any of the
2 parties that are included in the third party releases?

3 THE COURT: No.

4 MR. HALL: Thank you, Your Honor. Appreciate it.

5 THE COURT: Okay. Is there anything else for
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15 appreciate it all. And with that, I wish everybody a good
16 day and we are adjourned.

17 MS. GOOD: Thank you, Your Honor.

18 MR. HALL: Thank you, Your Honor.

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